IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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SUPREME COURT, U.S.

NO. 80-1278

DEWEY SOWDERS, WARDEN, Petitioner

v.

GEORGE H. CLEAVER, Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

WHETHER, UNDER THE FACTS AND CIRCUMSTANCES OF HIS CASE, THE RESPONDENT WAS DENIED HIS RIGHT TO EQUAL PROTECTION OF LAW AND HIS DUE PROCESS RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHEN HIS APPOINTED APPELLATE COUNSEL FAILED TO FILE A TIMELY BRIEF BEFORE THE SUPREME COURT OF KENTUCKY WITH THE RESULT THAT THE RESPONDENT'S DIRECT APPEAL FROM HIS CONVICTION WAS DISMISSED?

COUNTERSTATEMENT OF THE CASE

Contrary to his plea, the respondent was found guilty by the jury in the Johnson Circuit Court, Kentucky, on one count of murder and one count of robbery in the first degree (Trial Transcript of Record, hereinafter designated T.T.R., pp. 71-73). The respondent was sentenced to life imprisonment on the murder charge and to twenty (20) years imprisonment on the robbery charge (T.T.R., p. 72). Final judgment was entered by the Johnson Circuit Court on February 5, 1976 (T.R., pp. 74-75), and the Notice of Appeal was filed on the same day (T.T.R., p. 76).

After an extensive delay in the preparation of the transcript of evidence, the respondent's Statement of Appeal and record on appeal were filed on January 19, 1977, with the Supreme Court of Kentucky (Appendix to Brief for Respondent-Appellant before Sixth Circuit, hereinafter designated App. S.C., pp. 20-22).

On February 28, 1977, the respondent, by assigned appellate counsel, William M. Radigan, filed a timely motion requesting an extension of thirty (30) days in which to file the brief on appeal, to and including March 30, 1977 (App. S.C., pp. 26-28). The respondent made this motion pursuant to Kentucky Rule of Appellate Procedure (herinafter designated RAP) 1.230 and 1.450(a).[1] As grounds for this motion, the respondent stated, inter alia:

> Since the filing of the record on appeal, the undersigned counsel has had numerous pleadings which have been filed within the required period of time, including appellate briefs filed on January 21, February 1, February 2, (two briefs), February 21, and February 24, 1977 (App.S.C., p. 26).

On the same day, the respondent filed a Motion with the Supreme Court of Kentucky requesting permission to file a supplemental transcript of record (App.S.C., pp. 23-25). This supplemental record consisted of the transcript of the voir dire of the jury

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[1] Now, Kentucky Rule of Civil Procedure (CR) 76.12(2)(b) and CR 76.40.

at respondent's trial. The official court reporter for the Johnson Circuit Court had been unable to complete that portion at the time the original record was filed (App.S.C., pp. 23-25).

In a letter dated March 15, 1977, the Clerk of the Supreme Court informed respondent's appellate counsel that an extension to and including March 30, 1977, had been granted "as a FINAL extension", and that the supplemental record was ordered docketed as of March 15, 1977 (App.S.C., p. 29).

On March 30, 1977, respondent filed a motion requesting an additional extension of thirty (30) days in which to file his brief on appeal (App.S.C., pp. 30-32). Once again, respondent's counsel explained to the Supreme Court of Kentucky that his case-load mandated the requested additional time:

> During the next ten (10) days, the undersigned counsel has seven (7) appellate briefs which are scheduled to be filed with this Court and the Court of Appeals. In an attempt to complete as many of these pleadings as possible, the undersigned counsel has been forced to devote a majority of his available time to completing other cases to the detriment of appellant's appeal. The requested additional time is required to allow the undersigned counsel to devote the time to appellant's case which is necessarily required by its complexity and length (App.S.C., p. 30).

Respondent's counsel then explained the dilemna in which he found himself:

> Under Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 1400, 18 L.Ed.2d 493 (1967), appointed counsel's "role as advocate requires that he support his client's appeal to the best of his ability." Under our adversary system, it has become a well-established principle that there is no substitute for counsel who acts as an advocate and who makes the best arguments he can on the facts and the law. High v. Rhay, 519 F.2d 109, 113 (9th Cir. 1975), citing Anders v. California, supra. Accordingly, when an appointed counsel in a criminal appeal because of his total volume of work is unable to devote sufficient time to complete a professionally competent appellate brief within the allotted time period, his only recourse is to seek an extension of time from the appellate court. If the appointed counsel declines to request an extension and instead files a perfunctory brief, the indigent appellant is denied the effective assistance of counsel on appeal, a right which he is guaranteed by the Sixth Amendment (App.S.C., p. 31).

In an order entered on April 20, 1977, the Supreme

Court of Kentucky denied the requested extension of time (App., p. 33).

On July 29, 1977, respondent's appellate counsel filed a Motion For Enlargement of Time for Filing Brief on Appeal or, In the Alternative, Motion for Clarification Of the Status Of Appellant's Appeal with the Supreme Court of Kentucky (App.S.C., pp. 34-47). At the same time, the respondent tendered a Brief for Appellant to the Clerk of the Supreme Court (App., p. 36). This brief was thirty-five (35) pages in length and presented five (5) assignments of error. The issues presented to the Supreme Court of Kentucky as the basis for the reversal of the respondent's conviction were as follows:

I.

DID THE TRIAL COURT ERR TO APPELLANT'S SUBSTANTIAL PREJUDICE BY OVERRULING APPELLANT'S MOTION TO DISMISS THE JURY ON THE BASIS THAT THE JURY WAS EXPOSED TO THE FACT THAT APPELLANT WAS SHACKLED?

II.

WAS THE TRIAL COURT'S USE OF OUT-OF-COURT REPORTS BY TWO EXAMINING PHYSICIANS TO DETERMINE THE APPELLANT'S COMPETENCY TO STAND TRIAL A DENIAL OF THE APPELLANT'S RIGHT TO CONFRONTATION UNDER THE SIXTH AMENDMENT?

III.

DID THE COURT BELOW ERR TO APPELLANT'S SUBSTANTIAL PREJUDICE AND DENY THE APPELLANT HIS CONSTITUTIONAL RIGHT TO PRESENT EVIDENCE IN HIS BEHALF WHEN CERTAIN TESTIMONY AS TO APPELLANT'S MENTAL CONDITION WAS RULED INADMISSIBLE?

IV.

DID THE COURT BELOW ERR TO APPELLANT'S SUBSTANTIAL PREJUDICE BY SUBMITTING AN INSTRUCTION TO THE JURY, OVER APPELLANT'S OBJECTION, ON UNINTENTIONAL MURDER WHEN SUCH AN INSTRUCTION WAS NOT SUPPORTED BY THE EVIDENCE?

V.

DID THE COURT BELOW ERR TO APPELLANT'S SUBSTANTIAL PREJUDICE BY REFUSING THE APPELLANT'S TENDERED INSTRUCTION AS TO THE EFFECTS OF A VERDICT OF NOT GUILTY BY REASON OF INSANITY?

In his Motion, respondent's counsel initially explained the reason for the long delay in preparing the brief:

> At first glance, it may seem that the appellant's requested enlargment of one hundred and twenty-one (121) days reveals that the undersigned counsel was dilatory in his attempt to complete the appellant's brief. However, this is not the case at all. Once this Court revealed, through its April 20, 1977, Order, its general policy of denying additional motions for extensions of time, the undersigned counsel was forced to complete as many appellate pleadings as possible within the requisite time. Consequently, the undersigned counsel has been forced to defer work on the appellant's case since March 30, 1977, while completing briefs for his numerous other clients within the scheduled time. As evidence of this predicament, it should be noted that since March 30, 1977, the undersigned counsel has filed some twenty-three (23) timely appellate briefs with this Court and the Court of Appeals (App.S.C., p. 37).

In examining the requested enlargement of time, the respondent's appellate counsel presented five points of analysis: (1) The failure of the appellate counsel to file the brief within the allotted time was the result of excusable neglect (App.S.C., pp. 37-39; (2) Ethical considerations mandated that the respondent's counsel request two extensions of time for filing respondent's brief - the second of which was denied by the Court (App.S.c., pp. 39, 41-42); (3) The respondent's constitutional right to effective assistance of counsel on appeal obligated his appellate counsel to request the two extensions of time (App.S.C., pp. 39-41); (4) The respondent's counsel submitted that it was improper for an appellate court to penalize the respondent for the failure of his counsel to file a timely brief (App., S.C. pp. 41-44); and (5) The failure of the Supreme Court to grant the requested enlargement of time constitutes a denial of respondent's constitutional right to be represented by appellate counsel and his right to present a brief in support of his challenge to his conviction (App.S.C., pp. 44-45).

In discussing the request for clarification, the respondent's counsel noted: (1) The Rules of Appellate Procedure

include the provision that an appeal may be dismissed for an appellant's failure to file a brief. However, this penalty is clearly discretionary, not mandatory (App.S.C., pp. 44-45); (2) If his appeal is dismissed, then the respondent would be denied his constitutional right to effective assistance of counsel on appeal (App.S.C., pp. 45-46); and (3) The procedural requirements of the Supreme Court are outweighed by the respondent's constitutional rights on appeal (App.S.C., pp. 46-47).

On August 11, 1977, the Commonwealth filed their Response to Motion for Enlargement of Time (App.S.C., pp. 48-51). Additionally, on the same day, a Motion to Dismiss Appeal on the basis of the respondent's failure to timely file his brief was filed with the Supreme Court of Kentucky (App.S.C., pp. 52-53).

In an Order entered on September 13, 1977, the Supreme Court of Kentucky denied the respondent's request for an enlargement of time, and, furthermore, dismissed the respondent's appeal (App.S.C., p. 54).

On September 19, 1977, respondent's appellate counsel filed a Motion for Reconsideration En Banc (App.S.C., pp. 55-59). The respondent, inter alia, examined the ramifications of the Order of September 13, 1977:

> The net effect of this Order is threefold:
>
> a) Contrary to Section 115 of the Kentucky Constitution, the appellant has been denied his right to "at least one appeal to another court."
>
> b) Even though the requisite appellate pleadings have been tendered to this Court, the appellant is not allowed to have his arguments considered on their merits. This result has occurred solely because he was represented by the Office of Public Defender whose mandated caseload precluded the undersigned counsel from complying with the procedural rules of this Court.
>
> c) Finally, this Court by its Order has recognized that the appellant has been denied his right to the effective assistance of counsel on appeal. Such a result is constitutionally impermissible. Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967); Macon v. Lash, 458 F.2d 942 (7th Cir. 1972); Blanchard v. Brewer, 429 F.2d 89 (8th Cir. 1970); Shipman v. Gladden, Or., 453 P.2d 921 (1969); People v. Brown, 235 N.E.2d 562 (Ill. 1968) (App.S.C., pp. 56-57).

The Commonwealth filed its Response on September 26, 1977 (App.S.C., pp. 60-62). In an Order entered on October 5, 1977, the Supreme Court, without any comment, denied the motion for reconsideration (App.S.C., p. 63).

Following the denial of the reconsideration, Hon. James Early, respondent's trial counsel, approached the Johnson Circuit Court in an attempt to have the respondent's appeal reinstated. In an Order signed on October 25, 1977, Judge W. B. Hazelrigg reinstated respondent's right to appeal "because of his appellate counsel's ineffective assistance" (App.S.C., p. 64).

Subsequently, on November 30, 1977, the respondent's case was filed with the Clerk of the Supreme Court of Kentucky (App.S.C., pp. 65-66, 70). At this same time, respondent's appellate counsel requested leave to submit the case on the briefs which had been tendered to the Supreme Court on July 29, 1977 (App.S.C., pp. 67-69). On January 5, 1978, the Supreme Court granted the requested relief (App.S.C., p. 73).

On January 19, 1978, the Commonwealth filed a Motion to Dismiss Appeal on the ground that "the trial court did not have jurisdiction either inherently or by statute" to reinstate respondent's appeal (App.S.C., pp. 75-77). On February 2, 1978, the counsel for the Commonwealth filed a second Motion to Dismiss (App.S.C., pp. 82-85). The respondent, through his appellate counsel, extensively replied to both these motions (App.S.C., pp. 78-81, 86-88). In an Order dated February 15, 1978, the Supreme Court denied all of the Commonwealth's motions (App. S.C., p. 89).

However, at the oral argument in the respondent's case, the Supreme Court sua sponte "reconsidered the motions to dismiss" (App.S.C., p. 89). After reviewing the factual background of his case, the Supreme Court of Kentucky in a published opinion dismissed the respondent's appeal for the second time for two reasons: (1) That the reinstatement of respondent's appeal by the trial court "was in effect an appeal to the Johnson Circuit Court to adjudicate an issue when that same issue already has been disposed of" in the Supreme Court of Kentucky (App.S.C., p. 93); (2) That "RCr 11.42 does not confer jurisdiction on a circuit court to reinstate a right of appeal"

(App.S.C., p. 94). See: Cleaver v. Commonwealth, Ky., 569 S.W.2d 166 (1978).

On October 13, 1978, the respondent filed his petition for a writ of habeas corpus with a supporting memorandum in the District Court (App.S.C., pp. 1-16). In essence, the respondent alleged that he was denied his right to appeal through the ineffective assistance of his assigned appellate counsel. The Commonwealth's answer was filed on November 22, 1978 (App.S.C., pp. 97-124).

In a Memorandum Opinion filed on May 30, 1979, the District Judge concluded that respondent's assigned counsel on appeal had rendered ineffective assistance of counsel by failing to file respondent's brief on appeal within the time prescribed by the Supreme Court of Kentucky (App.S.C., pp. 133-139). The Commonwealth filed its Notice of Appeal on June 28, 1979 (App.S.C., p. 141).

In his pleadings before the Sixth Circuit, the petitioner argued not only that there was no constitutional right to the effective assistance of appellate counsel, but also that the respondent was not denied his rights under the Equal Protection Clause of the Fourteenth Amendment:

> It is the appellant's argument that the dismissal of an appeal as the result of procedural default does not constitute invidious discrimination. Accordingly, the appellant further argues that Equal Protection was not violated and, therefore, does not give the petitioner a federal right to have his appeal reinstated (Brief for Respondent-Appellant, p. 14).

See also: Brief for Respondent-Appellant at pp. 17-18, 20, 48, 50. Consequently, the respondent's arguments before the court below was couched in both due process and equal protection terms.

In an Opinion rendered on October 31, 1980, the Sixth Circuit affirmed the issuance of a conditional writ of habeas corpus. Cleaver v. Bordenkircher, 634 F.2d 1010 (6th Cir. 1980). In so doing, the Sixth Circuit concluded that the respondent was denied his right to equal protection of law:

> [Respondent] has been deprived of his right to appeal his conviction solely because his indigency status made the overburdened public defender his only source of legal representation. Id., at 1012.

As an alternative basis for its Opinion, the Sixth Circuit adopted the rationale of the District Judge that the respondent was denied his right to effective assistance of appellate counsel. Id., at 1012.

REASONS FOR DENYING THE WRIT

I.

CONTRARY TO THE SUGGESTION OF THE PETITION, THE CONCLUSION OF THE SIXTH CIRCUIT THAT THE RESPONDENT WAS DENIED HIS DUE PROCESS RIGHT TO THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WAS BASED UPON SUBSTANTIAL AND CONTROLLING LEGAL PRECEDENT.

Throughout his pleadings before this Court, the petitioner has consistently argued that "there can be no Constitutional right to effective assistance of appellate counsel on appeal. . ." Petition, at p. 14. The respondent submits a review of decisions of this Court, the lower federal courts, and the various state courts reveals that due process of law and fundamental fairness mandate the effective assistance of appellate counsel.

a - The Supreme Court

During the past twenty (20) years, this Court has given extensive consideration to the rights of indigents on appeal. In Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), the Court examined an Illinois rule which allowed appellate review of a criminal conviction only if the defendant paid for the trial transcript. As a result, an indigent who could not afford the cost of obtaining the transcript was precluded from obtaining appellate review of his conviction. Four justices concluded that this procedure violated both the due process clause and the equal protection clause of the Fourteenth Amendment. Mr. Justice Frankfurter, who cast the deciding vote, concluded that the Illinois procedure violated the equal protection clause. Id., 76 S.Ct. at 592.

In Smith v. Bennett, 365 U.S. 708, 81 S.Ct. 895, 6 L.Ed.2d 39 (1961), Iowa required a filing fee in order to file a state habeas petition, and in Burns v. Ohio, 360 U.S. 252, 79 S.Ct. 1164, 3 L.Ed.2d 1209 (1959), the Supreme Court of Ohio Required a $20.00 filing fee for leave to appeal a judgment to the Ohio Court of Appeals. Each of these state-imposed financial barriers to an appeal was held to violate the Fourteenth Amendment.

Similarly, the Court invalidated a number of barriers to access to a transcript for appellate purposes. For example, Lane v. Brown, 372 U.S. 477, 83 S.Ct. 768, 9 L.Ed.2d 892 (1963), involved an Indiana statute providing that only the public defender could obtain a free transcript. In Draper v. Washington, 372 U.S. 487, 83 S.Ct. 774, 9 L.Ed.2d 899 (1963), and indigent could obtain a free transcript only if he convinced the trial judge that the appeal was not frivolous. Such screening devices were likewise held violative of the Fourteenth Amendment.

In Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963), the Court expanded its review of appellate process to examine whether an indigent's access to an appellate system was adequate. In concluding that a state must provide counsel for the indigent on his first appeal as of right, the Court relied upon both the due process clause and the equal protection clause of the Fourteenth Amendment:

> But it is appropriate to observe that a State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an "invidious discrimination."
>
> When an indigent is forced to run this gantlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure. Id., 83 S.Ct. at 816; (emphasis added).

Contrary to the extensive argument presented by the petitioner to this Court, both clauses of the Fourteenth Amendment apply to an examination of an indigent's access to an appellate system. If there was any question on this matter, it was resolved by the decision in Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974). Mr. Justice Relinquist explained:

> The precise rationale for the Griffin and Douglas lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that amendment. Neither Clause by itself provides an entirely satisfactory basis for the result reached, each depending on a different inquiry which emphasizes different factors. "Due process" emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. "Equal protection," on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable. Id., 94 S.Ct. at 2443; (emphasis added).

It is precisely because of the due process clause that this Court has made it clear that an indigent's appellate counsel cannot abandon his appeal in midstream. Entsminger v. Iowa, 386 U.S. 748, 87 S.Ct. 1402, 1402, 18 L.Ed.2d 501 (1967), ("Here there is no question but that petitioner was precluded from obtaining a complete and effective appellate review of his conviction. . .").

In Anders v. California, 836 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), the Court made it unmistakably clear that an indigent's appellate counsel must provide a minimum level of competent representation. The Court required, as a matter of federal constitutional law, that the indigent receive "that advocacy which a nonindigent defendant is able to obtain." Id., 87 S.Ct. at 1400. The reasoning for this Court's requirement of an "active advocate" on appeal is conclusive as to the issue as to whether an indigent is entitled to effective assistance of appointed counsel:

> Moreover, such handling would intend to protect counsel from the constantly increasing charge that he was ineffective and had not handled the case with that diligence to which an indigent defendant is entitled. Id., 87 S.Ct. at 1400; (emphasis added).

As the Seventh Circuit stated in Nickels v. Gagnon, 454 F.2d 467, 471 (7th Cir. 1971):

> The Anders opinion requires appointed counsel to represent his client effectively. . .and to demonstrate in writing that he has discharged his professional responsibilities. (emphasis added).

b - The Lower Federal Courts

The lower federal courts are unanimous in holding that the critical error of court-appointed counsel cannot serve to deny his client's right to appeal. In Macon v. Lash, 458 F.2d 942 (7th Cir. 1972), in an opinion by Mr. Justice Stevens (then Circuit Judge), the petitioner claimed that the incompetence of court-appointed counsel denied his right to appeal. In Macon, counsel filed a futile motion for extension of time instead of a timely motion for a new trial. As a result, Mr. Macon lost his right to appeal his conviction for murder. Speaking in words remarkably appropirate to the case at bar, Mr. Justice Stevens stated:

> With due respect for the views of the Indiana Supreme Court, we are persuaded that petitioner's federal claim has merit. The Federal Constitution contains no requirement that a defendant be given appellate review of his conviction, but if such review is provided, appellate procedures and their availability to the indigent must satisfy the Fourteenth Amendment's basic standards of fairness. Since the Supreme Court has held that those standards require the states to waive even nominal filing fees, to provide free transcripts, to appoint counsel, and to refuse to dismiss meritless appeals that have not been adequately evaluated by appellate counsel, we believe it is equally clear that petitioner's right to appeal could not be forfeited by the critical error of inexperienced court-appointed counsel disclosed by this record. Id., at 949-950; (emphasis added; footnotes omitted).

In Benoit v. Wingo, 423 F.2d 880 (6th Cir. 1970), the Sixth Circuit examined a factual circumstance remarkably similar to the case at bar. In the cited case, the appellant's court-appointed attorney filed a timely notice of appeal and obtained an extension of time for perfecting the appeal. Id., at 881. The attorney then wrote the appellant a letter informing him that the appeal "would be wasting our time" and refusing to continue with the appeal. Id., at 881-882. The Court, in analyzing the appellant's situation, stated:

> Counsel in his letter to the appellant, abandoning the appeal, wrote with such finality that it gave the appellant no opportunity to request him to continue with the appeal. Further, counsel did not leave the appeal in such status that the appellant being confined in prison and being unlearned in law could be expected to pick it up pro se and prosecute it to the conclusion. Neither did he have an opportunity to have the trial judge appoint new counsel to assist him in the prosecution of his appeal. The appellant was entitled not only to an appeal as a matter of right but he was entitled to have the assistance of counsel in proceeding that appeal. Id., at 883; (emphasis added).

In directing the issuance of a conditional writ of habeas corpus, the Court concluded "that the appellant did not have adequate and effective assistance of counsel in prosecuting his appeal." Id., at 883.

In an effort to avoid extensive repetitive argument, respondent lists below other federal decisions which concluded that the error of appellate counsel (whether court-appointed or retained) cannot serve to deny a defendant access to the appellate process:

D.C. CIRCUIT

Hines v. United States, 237 A.2d 827 (D.C. Cir. 1968) (counsel files late notice of appeal).

FIRST CIRCUIT

Leventhal v. Gavin, 396 F.2d 441 (1st Cir. 1968) (counsel fails to preserve appeal).

SECOND CIRCUIT

United States ex rel Maselli v. Reincke, 383 F.2d 129 (2nd Cir. 1967) (counsel fails to appeal); United States ex rel Smith v. McMann, 417 F.2d 648 (2nd Cir. 1969) (attorney fails to inform indigent of appellate rights).

FOURTH CIRCUIT

Williams v. Coiner, 392 F.2d 210 (4th Cir. 1968) (counsel fails to file Notice of Appeal); Nelson v. Peyton, 415 F.2d 1154 (4th Cir. 1969) (attorney fails to advise client of right to appeal); Turner v. North Carolina, 412 F.2d 486 (4th Cir. 1969) (attorney fails to preserve appeal).

FIFTH CIRCUIT

Horsley v. Simpson, 400 F.2d 708 (5th Cir. 1968) (attorney fails to file Notice of Appeal); Atilius v. United States, 406 F.2d 694 (5th Cir. 1969) (counsel fails to file Notice of Appeal); Rought v. Henderson, 445 F.2d 622 (5th Cir. 1971) (attorney fails to preserve appeal); Lumpkin v. Smith, 439 F.2d 1084 (5th Cir. 1971) (counsel fails to advise client as to right of appeal); Hall v. Wainwright, 441 F.2d 391 (5th Cir. 1971). (notice of appeal filed late); Mosley v. Smith, 470 F.2d 1320 (5th Cir. 1973) (attorney fails to file Notice of Appeal, withdraws as counsel of record); Flanagan v. Henderson, 496 F.2d 1274 (5th Cir. 1974) (counsel fails to obtain entire record on appeal); Pressley v. Wainwright, 540 F.2d 818 (5th Cir. 1976) (counsel withdraws after appeal begun, public defender doesn't substitute in time); Cantrell v. Alabama, 546 F.2d 652 (5th Cir. 1977) (attorney fails to file proper record on appeal); Passmore v. Estelle, 594 F.2d 115 (5th Cir. 1979) (one sentence brief).

SIXTH CIRCUIT

Goodwin v. Cantrell, 432 F.2d 521 (6th Cir. 1970) (failure to advise client of right to appeal); Henderson v. Cardwell, 426 F.2d 150 (6th Cir. 1970) (counsel fails to advise client of appellate rights); Yates v. Wingo, 425 F.2d 1167 (6th Cir. 1970) (attorney fails to file Notice of Appeal); Woodall v. Neil, 444 F.2d 92 (6th Cir. 1971) (attorney abandons appeal); Rosinski v. United States, 459 F.2d 59 (6th Cir. 1972) (attorney fails to perfect appeal)); Davis v. United States, 464 F.2d 1009 (6th Cir. 1972) (attorney withdraws after sentencing); Boyd v. Cowan, 494 F.2d 338 (6th Cir. 1974) and Boyd v. Cowan, 519 F.2d 182 (6th Cir. 1975) (failure to preserve appeal).

EIGHTH CIRCUIT

Williams v. United States, 402 F.2d 548 (8th Cir. 1968) (attorney fails to file Notice of Appeal); Blanchard v. Brewer, 429 F.2d 89 (8th Cir. 1970) (counsel fails to serve Notice of Appeal).

NINTH CIRCUIT

Gairson v. Cupp, 415 F.2d 352 (9th Cir. 1969) (failure to file Notice of Appeal); Riser v. Craven, 501 F.2d 381 (9th Cir. 1974) (counsel fails to file Notice of Appeal); High v. Rhay, 519 F.2d 109 (9th Cir. 1975), (four page brief).

TENTH CIRCUIT

Wynn v. Page, 369 F.2d 930 (10th Cir. 1966) (client not informed of appellate rights).

c - state courts

In addition to the federal courts, state courts apparently without exception, support respondent's position. In Shipman v. Gladden, Ore., 453 P.2d 921 (1969), the appellant's counsel failed to file a timely notice of appeal. As a result, Mr. Shipman lost his right to appeal to the Oregon Supreme Court. However, the Court, in banc, affirmed the granting of his motion for a belated appeal, stating:

> We hold that because of the culpable negligence of his counsel petitioner was deprived of his Fourteenth Amendment right to due process. Since the state's criminal process would be found lacking in fundamental fairness if it permitted the deprivation of appellate review by the culpable neglect of counsel, the state must provide a remedy adequate to restore the impaired right. Id., at 927; (emphasis added).

In McAuliffe v. Rutledge, 231 Ga. 745, 204 S.E.2d 141 (1974), the Supreme Court of Georgia examined a situation where an appeal was dismissed due to the failure of counsel to obtain a timely extension of time for filing the transcript on appeal. In holding that this inaction constituted ineffective assistance of counsel, the court stated:

> An attorney who through negligence, ignorance, or misinterpretation of the law as contended here, fails to perform routine duties resulting in a dismissal of his client's appeal, thereby denying such client's a right of review after conviction cannot be said to be rendering effective assistance. The result is the same as no assistance at all. Whether counsel was retained, as here, or appointed by the court, is immaterial. Id., 204 S.E.2d at 142.

The Court of Appeals of Maryland in Wilson v. State, Md., 399 A.2d 256 (1979), reached a similar result when analyzing the exact issue presented in the case at bar:

> Entitlement to assistance of counsel would be hollow indeed unless the assistance were required to be effective. It follows that a criminal defendant has the right to the effective assistance of counsel on the direct appeal of the judgment entered upon his conviction of a serious crime. Id., at 260; (emphasis added).

Interestingly, enough the Kentucky Court of Appeals has seemingly recognized that a defendant has the right to effective assistance of counsel on appeal. See: Blankenship v. Commonwealth, Ky.App., 554 S.W.2d 898 (1977); Lomax v. Commonwealth, Ky.App., 581 S.W.2d 27 (1979).

Other jurisdictions which have recognized that a defendant cannot be denied his right to appeal due to error by his appellate counsel include:

CALIFORNIA

In Re Smith, 87 Cal.Rptr. 687, 471 P.2d 8 (1970) (brief consisting of one page of legal argument).

DELAWARE

Erb v. State, Dela., 332 A.2d 137 (1974) (counsel fails to prepare transcript and record).

HAWAII

State v. Erwin, Ha., 554 P.2d 236 (1976) (counsel files a late Notice of Appeal).

ILLINOIS

People v. Brown, 39 Ill.2d 307, 235 N.E.2d 562 (1968) (attorney fails to file brief); People v. Jacobs, 61 Ill.2d 590, 338 N.E.2d 161 (1975) (attorney obtains two extensions of time to file record on appeal, but never files either record or brief); People v. Aliwoli, 60 Ill.2d 579, 328 N.E.2d 555 (1975) (counsel obtains three extensions of time to file brief on appeal, but never files brief).

MISSOURI

State v. Scott, Mo., 492 S.W.2d 168 (1973) (counsel failed to file Notice of Appeal); Ray v. State, Mo., 523 S.W.2d 478 (1975) (attorney gives client incorrect information about implications of successful appeal).

TENNESSEE

Moultrie v. State, Tenn., 542 S.W.2d 835 (1976) (counsel fails to file petition for certiorari to Tennessee Supreme Court).

TEXAS

Steel v. State, Tex., 453 S.W.2d 486 (1970) (attorney fails to file brief); Garza v. State, Tex., 433 S.W.2d 428 (1968) (failure to file brief); Jackson v. State, Tex., 447 S.W.2d 922 (1969) (no appellate briefs filed); Ex Parte Hill, Tex., 528 S.W. 2d 259 (1975) (failure to file brief); Ex Parte Raley, Tex., 528 S.W.2d 257 (1975) (retained counsel failed to file appellate brief); Guillory v. State, Tex., 557 S.W.2d 118 (1977) (no transcript nor brief filed in appellate court); Hogan v. State, Tex., 572 S.W.2d 526 (1978) (no transcript of evidence nor brief filed with appellate court).

WEST VIRGINIA

State ex rel Bratcher v. Cooke, W.Va., 188 S.E.2d 769 (1972) (attorney fails to file timely written Notice of Appeal); Carter v. Bordenkircher, W.Va., 226 S.E.2d 711 (1976) (counsel fails to preserve appeal).

For the reasons stated, the respondent submits that the alternative finding of the Sixth Circuit that he was denied his constitutional right to the effective assistance of appellate counsel was based upon substantial legal precedent. Since the petitioner has failed to demonstrate that the opinion in the case at bar is in conflict with decisions of either this Court or the other federal circuits, the respondent respectfully requests this Court to deny this petition for writ of certiorari.

II.

CONTRARY TO THE ARGUMENT OF THE PETITIONER, THE DECISION OF THE SIXTH CIRCUIT IN THE RESPONDENT'S CASE DOES NOT UNDERMINE THE RULES OF APPELLATE PROCEDURE ESTABLISHED BY THE SUPREME COURT OF KENTUCKY.

In his petition before this Court, the petitioner has contended that the Sixth Circuit's opinion in the case sub judice is of national importance inasmuch as it undermines the rules of appellate procedure of Kentucky and all other states:

> The question presented here is of plenary national importance, because it implicates state appellate procedures in the entire United States. That is, if Kentucky courts cannot dismiss appeals under state Constitutional authority, based upon acts or omissions of appellate counsel who thereby automatically and per se render Constitutionally ineffective assistance, then neither can the courts of any other state. Petition, at pp. 22-23.

However, the respondent submits that the decision in his case does not alter the power of the Kentucky Supreme Court to enforce its valid procedural rules. In the present case, the Supreme Court of Kentucky's sanction was misplaced. The net effect of the actions of the Supreme Court of Kentucky was to deny the respondent his right under the Kentucky Constitution to appeal his conviction as punishment for his counsel's actions. Certainly this constitutes a denial of fundamental fairness.

If the Kentucky Supreme Court was of the opinion that respondent's counsel engaged in unprofessional and dilatory tactics, sanctions against undersigned counsel would have been proper. United States v. Hayes, 378 F.2d 567, 568 (4th Cir. 1967); United States v. Smith, 436 F.2d 1130 (9th Cir. 1970). See Barry v. State, Fla.App., 324 So.2d 95 (1975). However, regardless of respondent's counsel's performance of his duties (or lack thereof), "[t]he consequences of his lawyer's failure should not be visited upon [the petitioner] in the form of his loss of his right to appeal. . ." United States v. Hayes, supra, at 568.

The Fifth Circuit in Flanagan v. Henderson, 496 F.2d 1274 (5th Cir. 1974), recognized that any sanction for failure to comply with procedural rules must be applied against the negligent attorney and not the criminal defendant:

> When a court discovers that an attorney has been derelict in the performance of a court duty which could forfeit a legal right accorded to a defendant in a criminal case is significant as the right to an appeal on the merits, disciplinary measures against the attorney-rather than deprivation of the defendant's rights-may be the only constitutional remedy. Id., at 1278.

The Court of Criminal Appeals of Texas in Guillory v. State, Tex., 557 S.W.2d 118 (1977), addressed this same

issue and specified those measures which could be utilized to guarantee that the appellant's rights would be protected:

> As has been stated above, the trial court also has the duty to provide an indigent defendant with the effective assistance of counsel on appeal. This assistance, however, cannot be afforded without requiring that counsel file a brief in an appellate's behalf. The trial judge has the authority to require appointed counsel to file a brief in appellant's behalf. Luna v. State, 527 S.W.2d 548 (Tex.Cr.App. 1975). If a court-appointed attorney fails to file a brief within the time provided by Art. 40.09(9) and fails to request an extension of time from this Court under Art. 40.09(16), the trial court still has the authority to require appointed counsel to file a brief in an appellant's behalf. There are many ways for the trial court to exercise this authotity. Upon learning that no brief has been filed in appellant's behalf under Art. 40.09(9), the trial court can issue an order commanding court-appointed counsel to file a brief within a specified period of time. If no brief is filed within that time, the trial court can issue another order requiring counsel to show cause as to why he should not be held in contempt. See Art. 191la, supra. The trial court can also report counsel to the appropriate grievance committee for disciplianry action. In the alternative, the trial judge can relieve an appointed attorney who has not fulfilled his duties to his client and appoint an attorney who will act as an advocate to represent the indigent on appeal. The trial judge can also see to it that recalcitrant attorneys receive no further appointments to represent indigents in his court. Id., at 121.

It was the respondent's contention before the Supreme Court of Kentucky that the requested extension of time to file his appellate brief was primarily mandated by the workload of the Public Defender Office. The Supreme Court of Indiana has demonstrated an admirable sensitivity to the latter rationale. In Thomas v. State, Ind., 242 N.E.2d 919 (1969), the Court stated:

> We wish to make it clear that we do not hold or intend to imply that the public defender was incompetent or acted in an improper manner. Confronted with twice the normal case load, he may well have done all that he possibly had time to do for the appellant. If he did so, he properly performed the duties of his office. On the other hand, the appellant's rights can not be determined by the case load of the public defender. It

> is reversible error not to provide a defendant in a criminal prosecution with adequate legal representation at each stage of the proceeding, regardless of the circumstances which cause the public defender's office to become overloaded. If the public defender was too busy to adequately represent each of his clients, the court should have appointed other counsel to assist him in carrying out his responsibilities. Id. at 925; (emphasis added).

Contrary to the assertion of the petitioner, the Sixth Circuit has indicated a sensitivity to the right of the Kentucky Supreme Court to enforce its procedural rules. In the respondent's case, the Court noted:

> We recognize Kentucky's right to decide, in the first instance, any disputed issue of fact concerning representations of work overload by counsel supplied by the State. If inaccurate claims are tendered, Kentucky can take measures to discipline any lawyer found to be untruthful in such representations, or willfully or negligently delinquent. Cleaver, supra, at 1012.

The petitioner has also argued before this Court that the decision in the respondent's case has imposed a limitation on the state courts which the federal courts do not impose on themselves. Petition, at pp. 9, 12. Nothing could be further from the truth.

Very recently, the Sixth Circuit decided the case of Carter v. City of Memphis, ____F.2d ____, No. 79-1056 (opinion rendered December 29, 1980), Sixth Circuit Review, Vol. 10, No. 3 at p. 4. In the cited case, the federal district court had dismissed a civil rights action because of the plaintiff's attorney's failure to comply with a pretrial order. Id. Even though it recognized the power to dismiss under FRCP 41(b), the Sixth Circuit held that the dismissal was an abuse of discretion inasmuch as the fault lay with the plaintiff's attorney, not the plaintiff:

> The dismissal of an action for an attorney's failure to comply is a harsh sanction which the court should order only in extreme situations showing "a clear record of delay or contumacious conduct by the plaintiff." . . .Absent this showing, an order of dismissal is an abuse of discretion; the court is

> limited to lesser sanctions designed to achieve compliance. . . .The sanction of dismissal is appropriate only if the attorney's dilatory actions amounted to failure to prosecute and no alternative sanction would protect the integrity of pre-trial procedures. . . .Dismissal is usually inappropriate where the neglect is solely the fault of the attorney. Id.

In the final analysis, the petitioner asks this Court to sanction a rule of law whereby an indigent defendant can be denied his right to a direct appeal through no fault of his own and be left without any remedy or recourse. There is a reason why the petitioner is unable to cite to any case law in support of his position - there is none.

The opinion of the Sixth Circuit in the respondent's case reflects proper deference to the right of the Kentucky Supreme Court to enforce its rules of appellate procedure. However, under the facts of the respondent's case, the sanction applied was inappropriate,. For these reasons, the petition for a writ of certiorari should be denied.

III.

IN ANY EVENT, THERE IS AN INDEPENDENT BASIS FOR THE DECISION OF THE SIXTH CIRCUIT IN THE RESPONDENT'S CASE WHICH HAS NOT BEEN PRESENTED TO THIS COURT BY THE PETITION FOR A WRIT OF CERTIORARI.

As previously discussed, the opinion of the Sixth Circuit in the case at bar was premised upon two alternative theories: (1) That the respondent was denied his right to equal protection of law inasmuch as his direct appeal was dismissed solely on the basis of his indigency.[1] Cleaver v. Bordenkircher, 634 F.2d 1010, 1012 (6th Cir. 1980); and (2) That

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[1] In his pleadings before this Court, the petitioner has complained that the equal protection analysis in Cleaver was never presented by the respondent to the federal district court. Petition, at pp. 17-19. Initially, it should be recalled that it was the petitioner who initially raised the equal protection question before the Sixth Circuit. Brief for Respondent-Appellant at pp. 14, 17-18, 20, 48, and 50. See: Counterstatement of Facts, infra, at p. 8 . More importantly, however, the petitioner never raised this issue before the Sixth Circuit once the opinion in Cleaver was issued. There was no petition for rehearing filed before the Sixth Circuit. If the petitioner felt that the Sixth Circuit erroneously decided the Cleaver case on equal protection grounds, then that

the respondent was denied his right to due process of law inasmuch as his appointed appellate counsel rendered ineffective assistance of counsel.

In the petition pending before this Court, the Question Presented For Review is as follows:

> Is There a Constitutional Right to the Effective Assistance of Appellate Counsel, as Opposed to Trial Counsel?

Consequently, assuming arguendo that this Court should grant the petition for a writ of certiorari, and assuming further that this Court should reverse the holding of the Sixth Circuit in Cleaver in regard to effective assistance of appellate counsel, there would still exist an independent basis for the Sixth Circuit opinion - the equal protection analysis. The hypothetical success of the petitioner's actions before this Court would not affect the issuance of a writ of habeas corpus.

In an analogous situation, this Court in The Monreso v. Carbon Black Export, Inc., 359 U.S. 180, 184, 79 S.Ct. 710, 3 L.Ed.2d 223 (1959), stated:

> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the. . .[issue in conflict] can await a day when the issue is posed less abstractly.

Since the petitioner is in essence requesting an advisory opinion from this Court, this petition for a writ of certiorari must be denied.

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[1](continued) issue should have been addressed to the Sixth Circuit - not raised for the first time in the petition pending before this Court. As a general rule, this Court will not consider contentions not presented to the court below. See, e.g., Dorszynski v. United States, 418 U.S. 424, 431 n.7 (1974); Jenkins v. Anderson, ___U.S. ___, 100 S.Ct. 2124, 2127 n.1 (1980); Anderson v. Charles, ___U.S. ___, 100 S.Ct. 2180, 2181 n.1 (1980); Sandstrom v. Montana, 442 U.S. 510 (1979).

CONCLUSION

For the reasons stated above, the respondent respectfully requests this Court to deny the Petition for a Writ of Certiorari filed in the above-captioned case.

Respectfully submitted,

WILLIAM M. RADIGAN
ASSISTANT PUBLIC DEFENDER
THIRD FLOOR
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J. VINCENT APRILE II
ASSISTANT DEPUTY PUBLIC ADVOCATE
THIRD FLOOR
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FRANKFORT, KENTUCKY 40601

CO-COUNSEL FOR RESPONDENT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

Misc. No. 80-1278

DEWEY SOWDERS, WARDEN
KENTUCKY STATE PENITENTIARY

Petitioner,

v.

GEORGE H. CLEAVER,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The respondent, George H. Cleaver, who is now held in the Kentucky State Penitentiary, asks leave to file the attached Brief for Respondent in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46 in the above-captioned action. The respondent has been permitted to proceed in forma pauperis in all proceedings in the court below.

The respondent's affidavit in support of this motion is attached hereto.

Respectfully submitted,

WILLIAM M. RADIGAN
ASSISTANT PUBLIC DEFENDER
OFFICE FOR PUBLIC ADVOCACY
STATE OFFICE BUILDING ANNEX
FRANKFORT, KENTUCKY 40601
CO-COUNSEL FOR RESPONSENT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-1278

DEWEY SOWDERS, WARDEN, Petitioner

v.

GEORGE H. CLEAVER, Respondent

CERTIFICATE OF SERVICE

I, William M. Radigan, co-counsel for respondent, hereby certify that the attached Brief for Respondent in Opposition, Motion for Leave to Proceed in Forma Pauperis, and Affidavit of Indigency were served on petitioner by mailing, U.S. postage prepaid, copies of the aforementioned documents, on February 26th, 1981, to respondent's counsel, J. Gerald Henry, Assistant Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601.

William M. Radigan

WILLIAM M. RADIGAN
ASSISTANT PUBLIC DEFENDER
MEMBER, BAR OF THE SUPREME
COURT OF THE UNITED STATES